Office-Supreme Court, U.S.
FILED
SEP 15 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-2138

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

CITIZENS FEDERAL SAVINGS AND LOAN ASSOCIATION
OF DAYTON, OHIO,
Appellant,

VS.

VAN W. PAGE, et al.,
Appellees.

On Appeal from the Court of Appeals
Twelfth Appellate District of Ohio

REPLY BRIEF OF APPELLANT TO MOTIONS TO DISMISS OR AFFIRM

ERNEST LEFF
ANDREW E. KATZ
LEFF & MASON
9665 Wilshire Boulevard
Seventh Floor
Beverly Hills, California 90212
(213) 859-1200

Attorneys for Appellant

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600.

25pp

TABLE OF CONTENTS

	Page
Introduction	1
This Court Has Appellate Jurisdiction	1
This Court Has Jurisdiction by Petition for Writ of Certiorari	2
The Alleged State Ground of Decision Is Neither Adequate Nor Independent	4
The Question Raised Is Substantial	8
Conclusion	10
Appendix. Excerpts from Citizens Federal's Brief of Appellant	1a

TABLE OF AUTHORITIES CITED

Cases	Page
Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921)	2
Dice v. Akron, Canton & Youngstown Railroad Company, 342 U.S. 359 (1952)	5
Enterprise Irrigation District v. Farmers Mutual Canal Company, 243 U.S. 157 (1917)	4, 8
Fidelity Federal Savings and Loan Association v. de la Cuesta, 458 U.S. 141 (1982)	2, 3, 4, 5, 8, 9
Hauenstein v. Lynham, 100 U.S. 483 (1879)	5
Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979)	1
McCarthy v. McCarthy, 453 U.S. 210 (1981)	2
Mondou v. New York, New Hampshire and Hartford Railroad Company, 223 U.S. 1 (1912)	5
Federal Regulations	
Code of Federal Regulations, Title 12, Sec. 545.8-3(f) (1982)	5
Code of Federal Regulations, Title 12, Sec. 556.9(f)(2)	7
Code of Federal Regulations, Title 12, Sec. 591 et seq. (1983)	9
Rules	
California Rules of Court, Rule 17.1(b)	3
California Rules of Court, Rule 17.1(c)	3
California Rules of Court, Rule 21.1(j)	3
Statutes	
Garn-St Germain Depository Institutions Act of 1982 (Public Law 97-320) Sec. 341	9
Ohio Revised Code, Sec. 5313 et seq.	2
United States Code, Title 28, Sec. 1257(2)	1
United States Code, Title 28, Sec. 1257(3)	3
United States Code, Title 28, Sec. 2103	2

No. 83-2138

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

CITIZENS FEDERAL SAVINGS AND LOAN ASSOCIATION
OF DAYTON, OHIO,
Appellant,

VS.

VAN W. PAGE, et al.,
Appellees.

On Appeal from the Court of Appeals
Twelfth Appellate District of Ohio

REPLY BRIEF OF APPELLANT TO MOTIONS TO DISMISS OR AFFIRM

INTRODUCTION

Appellees, Van W. Page and Cynthia A. Page, have moved to dismiss this appeal while Appellees, James D. Ethridge and Eva N. Ethridge, have moved to dismiss or affirm. The Appellees contend that this Court does not have appellate jurisdiction and that the issues raised may not be reviewed by treating the Jurisdictional Statement as a Petition for Writ of Certiorari. They further contend that the judgment below is fully supported by an adequate and independent state ground, and that, finally, the question raised here is not substantial.

Citizens Federal Savings and Loan Association ("Citizens Federal") demonstrates here that this Court does have either appellate or writ of certiorari jurisdiction, that the state ground alleged is neither adequate nor independent, but is, at best, an attempt to evade the overriding federal ground which controls the action, and that the question is substantial, affecting as it does hundreds of thousands, if not millions, of loan transactions nationwide.

THIS COURT HAS APPELLATE JURISDICTION

The Appellees argue that this Court does not have appellate jurisdiction, contending that a state statute was not held valid in the face of a challenge to its validity by reason of the Federal Constitution. The Appellees' argument is apparently grounded upon an overly literal reading of 28 U.S.C. §1257(2). This Court's jurisdiction is not so limited. This Court has frequently held that when a statute, while valid generally, is applied by a state court in a manner such that its application deprives the person against whom it is brought to bear of a right or privilege claimed to be preeminent by reason of the Federal Constitution or federal statutes that appellate jurisdiction exists. As this Court said in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 440-441 (1979):

> We have held consistently that a state statute is sustained within the meaning of Section 1257(2) when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds.

See also McCarthy v. McCarthy, 453 U.S. 210, 219 n. 12 (1981); and *Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282, 288-289 (1921).

In the present action, the state court has found that a land installment contract transfer of real property, as governed and controlled by Section 5313 *et seq.* of the Ohio Revised Code, creates an equitable lien which is beyond the scope of the due-on-sale clause rights of Citizens Federal. (Jurisdictional Statement Appendix at 7a-9a. Hereafter J.S. App.). Citizens Federal sought to exercise the due-on-sale clause in its mortgage documents pursuant to federal law and regulations, which federal rights Citizens Federal contends are preemptive of any and all state laws limiting those rights by virtue of the Supremacy Clause of the United States Constitution, as so recently held by this Court in *Fidelity Federal Savings and Loan Association v. de la Cuesta,* 458 U.S. 141 (1982), including Ohio Revised Code Section 5313 *et seq.* Ohio Revised Code Section 5313 *et seq.* was sustained when it was found by the Ohio court that a land installment contract transfer of real property could escape from the reach of the federal right claimed by Citizens Federal. (J.S. App. at 8a-9a). Jurisdiction by appeal is thus proper.

THIS COURT HAS JURISDICTION BY PETITION FOR WRIT OF CERTIORARI

Section 2103 of Title 28 of the United States Code provides that if an appeal is improvidently taken, this Court may treat the Jurisdictional Statement as a Petition for Writ of Certiorari and grant that Petition if appropriate.

Citizens Federal, in an abundance of caution, specifically so requested in its Jurisdictional Statement at 2 n. 2. This Court has jurisdiction by Petition for Writ of Certiorari "where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . or statutes of . . . the United States." 28 U.S.C. § 1257(3). Citizens Federal has met all of the requirements to have its Jurisdictional Statement considered as a Petition for Writ of Certiorari, including particularly, compliance with Rules 21.1(j) and 17.1(b) and (c) of this Court.

In its Jurisdictional Statement Citizens Federal argues that as a federally chartered savings and loan association regulated by the Federal Home Loan Bank Board, its exercise of the due-on-sale clause in a mortgage contract written on a nationally uniform mortgage contract form created by the Federal Home Loan Mortgage Corporation, a federal instrumentality, is governed exclusively by federal law. (J.S. at 5-15, and particularly 11-15). That federal law, and the rights of Citizens Federal thereunder, effectuate a federal policy intended to maintain the solvency and fiscal integrity of federal savings and loan associations, as was recognized by this Court in *Fidelity Federal v. de la Cuesta, supra,* 458 U.S. at 168-169. The decision of the Ohio court is in total disregard of that federal policy and Citizens Federal's claimed right and privilege under federal law. That court's decision is thus certainly in direct conflict with the applicable controlling decision of this Court, *Fidelity Federal v. de la Cuesta*, as well as in conflict with decisions of other state and federal courts, as cited by Citizens Federal (J.S. 14, n. 14).

Hence, if this Court does not have appellate jurisdiction, it certainly has writ of certiorari jurisdiction. It is strongly urged by Citizens Federal that this Court accept this action in order to make clear to the courts of the various states

that important federal policies, as recognized by this Court, may not be lightly evaded or circumvented.

THE ALLEGED STATE GROUND OF DECISION IS NEITHER ADEQUATE NOR INDEPENDENT

It is, of course, recognized by Citizens Federal that if the decision below is based upon a truly adequate and independent state ground that this Court may not review the decision, no matter how poorly the state court may have dealt with the federal issue involved, if at all. This Court, however, has frequently found an alleged state ground to be neither adequate nor independent such that a case which on its face may appear to be governed by state law, is rather controlled by federal law and is reviewable by this Court. As this Court noted in *Enterprise Irrigation District v. Farmers Mutual Canal Company,* 243 U.S. 157, 164 (1917):

> But where the non-Federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain. [Citations] And this is true also where the non-Federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the Federal question.

This Court has held on several occasions in matters involving the interplay of contracts and federal banking and savings and loan policies, such as are applicable here, that state contract law is not independent of the overriding federal policies. In *Fidelity Federal v. de la Cuesta, supra,* this Court noted probable jurisdiction and ruled in favor of Fidelity Federal notwithstanding the claim by the appellees there that a similar Federal Home Loan Mortgage Corporation nationally uniform mortgage contract was controlled by state law and was to be interpreted according to state law. This Court was not deterred by that assertion, stating:

Contending that the Wellenkamp doctrine is not inconsistent with the due-on-sale regulation, however, appellees point to the regulation's second sentence, which provides in pertinent part:

> "[E]xercise by the association of such option (hereafter called a due-on-sale clause) shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the association and borrower shall be fixed and governed by that contract." 12 C.F.R. § 545.8-3(f) (1982).

Appellees interpret this language as incorporating state contract law — and therefore any state law restricting the exercise of a due-on-sale clause. We note, however, that the incorporation of state law does not signify the inapplicability of federal law, for "a fundamental principle in our system of complex national polity" mandates that "the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution." *Hauenstein v. Lynham,* 100 U.S. 483, 490 (1879).

458 U.S. at 156-157. This Court's decision in *Fidelity Federal,* as quoted above, is also consistent with its earlier statement in *Mondou v. New York, New Hampshire and Hartford Railroad Company,* 223 U.S. 1, 57 (1912), where this Court stated that:

> When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state.

See also Dice v. Akron, Canton & Youngstown Railroad Company, 342 U.S. 359, 361 (1952), where this Court re-

jected reliance on state law in considering the effect of a contract which affected the federally created interest of a party to that contract.

> State laws are not controlling in determining what the incidents of this federal right shall be. [citation]. Manifestly, the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act. Moreover, only if federal law controls, can the federal Act be given the uniform application throughout the country essential to effectuate its purposes.

In the instant action the Ohio court first determined that the applicable federal regulations were valid and were intended to and could be relied upon so as to permit a due-on-sale clause in the mortgage instruments of a Federal association to be triggered by a land installment contract transfer of the security property (J.S. App. at 7a-8a). The court then held, in what can only be viewed as an effort to evade the overriding federal policy, that as a matter of state contract law the due-on-sale clause in the mortgage instrument was ambiguous, and applying purely state law of contract interpretation construed that ambiguity against Citizens Federal, thereby holding that the due-on-sale clause was not triggered by the instant transfer (J.S. App. at 8a-9a). In so doing, the state court *totally* failed to consider the overriding federal policy pertaining to the Federal Home Loan Bank Board's due-on-sale regulations, and failed to consider the purpose sought to be served by the nationally uniform mortgage instrument crafted by the Federal Home Loan Mortgage Corporation.

The Ohio Court also ignored the *explicit* statements of the Federal Home Loan Bank Board, as found in its regula-

tions and in its discussion of the due-on-sale regulations at the time those regulations were adopted. The Federal Home Loan Bank Board has made it clear that only federal law shall control questions pertaining to the enforceability of due-on-sale clauses by Federal associations, such as Appellant Citizens Federal. Thus, Federal Home Loan Bank Board Resolution No. 76-296, dated April 28, 1976, adopting the due-on-sale regulations applicable here stated:

> Finally, it was and is the Board's intent to have late charges and due-on-sale practices of federal associations *governed exclusively by federal law.* Therefore, charging of late charges and exercise of due-on-sale clauses by federal associations shall be governed and controlled solely by Section 545.6-11 and the Board's new statement of policy. *Federal associations shall not be bound by or subject to any conflicting state law* which imposes different late charges or due-on-sale requirements, ... (emphasis added)

The Bank Board's due-on-sale policy regulation as found at 12 C.F.R. § 556.9(f)(2) (J.S. App. 45a) reads:

> Paragraph (f) of § 545.8-3 confirms the continuing authority of Federal associations to include due-on-sale clauses in their mortgage loan contracts and to exercise such clauses, subject only to the express limitations contained in § 545.8-3(g). Due-on-sale practices of Federal associations shall be governed exclusively by the Board's regulations, in preemption of and without regard to limitations imposed by state law on either their inclusion or exercise (including, but not confined to, state law prohibitions against restraints on alienation, prohibitions against penalties and forfeitures, equitable restrictions and state law dealing with equitable transfers).

In the instant action, Citizens Federal specifically argued before the Ohio court that these federal policies and regula-

tions were controlling.[1] The court below studiously ignored Citizens Federal's argument that federal and not state law was controlling. While issues of contractual interpretation may ordinarily be issues of state law when, as here, controlling federal regulations and policy considerations explicitly command that Citizens Federal's rights under the due-on-sale clause and its ability to exercise that clause are to be governed *exclusively* by federal law, the state law ground, if it exists at all, is so interwoven with the overriding federal law and policy that the action cannot be decided, if at all, without regard to that federal law and federal policy. (*Enterprise Irrigation, supra; Fidelity Federal v. de la Cuesta, supra.*) Accordingly, as the teachings of this Court make clear, the state law issue argued so forcefully by the Appellees is neither adequate nor independent, and may not be relied upon to prevent this Court from reviewing and setting right the decision below. That decision, if permitted to stand, will permit every manner of transaction to be held outside the scope of a Federal association's due-on-sale clause rights, as created and governed by federal law, under the guise of contract interpretation.

THE QUESTION RAISED IS SUBSTANTIAL

The Appellees finally contend that the issue raised is not of sufficient moment so as to call for plenary review. In a

---

[1]Excerpts from Citizens Federal's Brief of Appellant, pp. 7-9 and 12-16 are reproduced at Appendix 1a-9a attached hereto. While Citizens Federal's statement of error in the Ohio court as commented upon by Appellees may not have been as artfully stated as might be wished, the appended excerpts of its brief demonstrate conclusively that the federal issue raised here was raised, briefed, and plainly relied upon by Citizens Federal below. Moreover, the fact that the Court of Appeal *first* held that the federal regulations *could* permit a due-on-sale clause to be exercised under the circumstances of a land installment contract sale demonstrates that the issue of federal preemption and Citizens Federal's rights under the federal regulations were indeed in issue. (J.S. App. at 5a-7a.)

sense, Citizens Federal agrees. The decision below is so obviously erroneous, and such a clear attempt to evade the controlling reach of federal law as so recently upheld by this Court in *Fidelity Federal v. de la Cuesta* as to warrant summary reversal. Should summary reversal, however, be inappropriate, then the matter is of sufficient merit so as to call for full consideration by this Court. Citizens Federal has argued at length the substantiality of the question presented at 5-15 of its Jurisdictional Statement, both as to the nationwide impact of the decision below and the egregious error of the Ohio court.

It is sufficient to note, in addition, that with the extension of federal due-on-sale policy to *all* real property secured lenders by Section 341 of the Garn-St Germain Depository Institutions Act of 1982 (Pub. L. 97-320) millions of real property transfers are now subject to an intended uniformity of result as to due-on-sale clause enforcement. That uniformity, as sought to be achieved by 12 CFR § 591 *et seq.* (1983), as adopted by the Federal Home Loan Bank Board pursuant to § 341 of that Act, will be totally undercut if each state may decide for itself, without regard to that federal policy, whether certain real property transfers will or will not be subject to due-on-sale clause enforcement. To preserve that intended national uniformity of result, especially when the loan contract in question is the Federal Home Loan Mortgage Corporation's nationally uniform instrument, calls for this Court's clear statement that federal law and federal policy must be given their due recognition in the resolution of any due-on-sale clause issue. Such was not done below.

If a state court can "interpret" a mortgage contract out from under controlling federal law for a land installment contract, then almost any transfer can be similarly interpreted as being outside the scope of that law. Under the theory of the Ohio court, if in an outright transfer (i.e. one

where title passes) the seller takes back a junior lien to secure a part of the purchase price, the due-on-sale clause could not be exercised, as a lien subordinate to the Federal associations lien was created. Such seller assisted financing is not unusual. If sellers learn that they can prevent exercise of the due-on-sale clause by simply taking back a small junior lien, the benefits of due-on-sale clause enforcement contemplated by the Bank Board will be defeated. Similarly, if nationally uniform mortgage instruments will be subject to state law interpretation as to those uniform covenants designed to implement federal policy that uniformity required to facilitate a viable secondary market will be threatened. The question presented is thus quite substantial when the magnitude of the loophole constructed by the court below is considered in context.

CONCLUSION

Citizens Federal respectfully asserts that this Court has jurisdiction by appeal and, if not, by Petition for Writ of Certiorari. The judgment below is not supported by an adequate and independent state ground, and the question presented is indeed quite substantial. It is urged that this Court deny the Appellees' motions, note probable jurisdiction, and summarily reverse the decision below.

Respectfully submitted

Ernest Leff
Andrew E. Katz
Leff & Mason
Attorneys for Appellant

APPENDIX

Warren

Case No. CA 83-03-018

In the Court of Appeals of Warren County, Ohio

CITIZENS FEDERAL SAVINGS AND LOAN
ASSOCIATION OF DAYTON, OHIO
Appellant,

VS.

VAN W. PAGE, et al.,
Appellees

Appeal from the Common Pleas Court of Warren County, Ohio

BRIEF OF APPELLANT,
Citizens Federal Savings and Loan Association of Dayton, Ohio

---

JOHN H. CURP
110 North Main Street
Dayton, Ohio 45402
Phone: (513) 229-8256

BETH W. SCHAEFFER
2700 Winters Bank Tower
Dayton, Ohio 45423
Phone: (513) 223-1130

Attorneys for Appellant,
Citizens Federal Savings
And Loan Association of
Dayton, Ohio

* * *

This holding is in error and completely ignores federal regulations promulgated by the Federal Home Loan Bank Board, as well as case precedent interpreting the precise language contained in the due on sale clause in question in this case.

On April 28, 1976, the Federal Home Loan Bank Board, via resolution number 76-296 promulgated a federal regulation relating to due on sale clauses, which expressly continued to allow federal savings and loan associations to include in loan contracts and enforce due on sale clauses — with certain specified exceptions. In that resolution the Federal Home Loan Bank Board stated that it is the Board's intent to have due on sale practices of Federal associations governed exclusively by Federal law, and stated specifically the following:

> ... exercise of due on sale clauses by Federal associations shall be governed and controlled solely by §545.6-11 and the Board's new Statement of Policy. Federal associations shall not be bound by or subject to any conflicting State law which imposes different ... due on sale requirements, nor shall Federal associations attempt to ... avoid the limitations on the exercise of due on sale clauses delineated in §545.6-11(g). (Federal Home Loan Bank Board Resolution No. 76-296, attached as Appendix F).

As part of Resolution No. 76-296 the Bank Board adopted §545.6-11(f) and (g) which reads in pertinent part as follows:

> §545.6-11(f) Due on sale clauses. A Federal association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instruments whereby the association may, at its option, declare immediately due and payable all of

the sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent. Except as provided in paragraph (g) of this section with respect to loans made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, exercise by an association of such an acceleration option (hereafter called a due on sale clause) shall be governed exclusively by the terms of the contract between the association and the borrower, and all rights and remedies of the association and borrower thereto shall be fixed and governed by said contract.

(g) Limitations on the Exercise of due on sale clauses. (1) With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, a Federal association may not exercise a due on sale clause based on any of the following:

(i) creation of a lien or other encumbrance subordinate to the association's security instrument;

The preemptive nature of the Bank Board's regulations has been conclusively determined by the United States Supreme Court in *Fidelity Federal Savings And Loan Association v. de la Cuesta* (1982), ____ U.S. ____, 102 S. Ct. 3014. The U.S. Supreme Court determined in that case that federal regulations have no less preemptive effect than federal statutes. *Id.* at 3021 and 3022. State law is nullified to the extent it conflicts or stands as an obstacle to the full exercise of the purposes and objectives of federal law.

The language of the due on sale clause in the mortgage executed by the Pages states as follows:

If all or any part of the property or an interest therein is sold or transferred by the borrower without the

> lender's prior written consent, excluding (a) the creation of a lien or encumbrance subordinate to the mortgage . . . Lender may . . . declare all sums . . . immediately due and payable.

This language in the Page's mortgage agreement exactly restates, almost word-for-word, the provisions of §545.8-3 (f) and (g) of the Regulations of the Federal Home Loan Bank Board set forth previously hereinabove. As such it is in full accord with the Bank Board's provisions.

The specific limitation — "excluding (a) the creation of a lien or encumbrance subordinate to the mortgage" — is an exact restatement of language contained in Section 545.8-3(g)(1) of the regulations of the Bank Board. Additionally, the Bank Board, in Resolution No. 76-296 *supra* adopted not just the regulation, but also an explanation of the limiting language in question. The Bank Board explains that

> Paragraph 545.6-11(g)(1) of this subchapter prohibits with respect to borrower-occupied-home loans . . . exercise of due on sale clauses to accelerate the loan based on creation of junior liens . . .

* * *

The holding of the Trial Court that a land contract transaction does not trigger the due on sale clause in the Page's mortgage ignores the underlying federal purpose of the due on sale clause; that is, the national, as well as local, economic problem recognized by the U.S. Supreme Court in the *Fidelity Federal Savings And Loan Association v. de la Cuesta, supra,* case. The combination of spiraling interest rates, which increase the cost of acquiring money to savings and loan associations, and the existence of fixed rate, long term loan commitments at low interest rates, has placed great financial strain on the savings and loan industry. The due on sale clause is one of the few contractual tools avail-

able to these associations to update their conventional mortgage portfolio yield. If lenders were denied this contractual right, interest rates would not be reduced in the long run. Instead, lenders simply would be forced to increase significantly the interest rates they charge on new mortgages or to abandon completely the concept of a fixed rate mortgage. The effect would be that some existing borrowers would receive an unbargained for windfall, contrary to the terms of their contracts, and new borrowers would be exposed to higher interest rates and a shortage of mortgage funds. Accordingly, the Federal Home Loan Bank Board determined several years ago that enforcement of the due on sale clause was essential to safeguard the interests of both the borrowing public and federal savings and loan associations.

Using very broad language in the *de la Cuesta* decision, the Supreme Court ruled in favor of the federal association and the Federal Home Loan Bank Board, which had been a very active participant in this and other due on sale clause litigation nationwide. The Court held that the Federal Home Loan Bank Board's regulation authorizing the use and exercise of the due on sale clause preempted and precluded the application of state law to the due on sale practices of federal associations. *Id.* at 3025. The Court based its ruling upon the fact that the Board clearly intended federal law to govern exclusively in this area and that Congress had delegated plenary authority to the Board to regulate the lending practices of federal associations, including due on sale clause practices. *Id.* at 3026.

The Court soundly ruled for the association and the Board on all major points in the case. In rejecting the argument that the Board's authority was not broad enough to preempt the application of state law to the terms of mortgage contracts of federal associations, the Court stated that the broad language of section 5(a) of the Home Owners'

Loan Act of 1933 "expresses no limits on the Board's authority to regulate the lending practices of federal savings and loans" *Id.* Indeed, the Court remarked that "it would have been difficult for Congress to give the Bank Board a broader mandate." *Id.* The Court further stated that "Congress plainly envisioned that federal savings and loans would be governed by what the Board — not any particular State — deemed to be the 'best practices.' " *Id.*

The Court's decision was meant to have very significant economic as well as legal impact on the savings and loan industry, home buyers, and federal agencies. It finally put to rest the assertion that state law may rewrite a mortgage contract and take away a right granted by federal law to federal associations to protect themselves from the risks inherent in providing long term, fixed rate mortgages during times of volatile interest rates. The law now is clear that federal associations, pursuant to Board regulations, may exercise due on sale clauses to update their mortgage portfolio yields.

The decision also was to have a significant impact in assisting the nation's savings and loan industry, which has been experiencing very difficult times in recent years, resulting principally from the fact that their average thirty year, fixed rate mortgage portfolio yield has been substantially less than their cost of funds. Because of this ruling, the negative "spread" between mortgage portfolio yield and cost of funds should narrow and, over time, hopefully disappear. The table below demonstrates the problem, which except as noted, these figures are taken from the 1980 Annual Report of the Federal Home Loan Bank Board, submitted to Congress in April 1981 (available from the Public Information Officer of the FHLBB).

	1978	1979	1980	May 1981[1]
Interest Income For $100 of Mortgages	$8.47	$8.83	$ 9.31	$ 9.58
Average Cost of Funds plus operating expenses of 1.2%	$7.87	$8.67	$10.14	$11.97
Net Income per $100 of Mortgages	$1.60	$ .16	($ .83)	($ 2.29)[2]

In addition, because of this ruling, federal associations will have an increased incentive and ability to continue to provide home buyers with the option of securing long term, fixed rate mortgages. To the extent that the decision lessens the need for rate speculation in making long term mortgages, it is likely to result in lower mortgage rates over time and to provide first time home buyers and purchasers of newly constructed housing fairer access to mortgage financing. Thus, although the decision may not be viewed by some observers as directly advantageous to consumers, it is clear that because this decision puts the savings and loan industry one step closer to stability and survival, it should, over time, correspondingly allow an economic environment to develop that will permit larger amounts of mortgage money to be available at lower and more stable interest rate levels.

The Supreme Court in *de la Cuesta* (at pp. 3029, 3030) recognized that Congress delegated power to the Bank Board expressly for the purpose of creating and regulating

---

[1]The May 1981 figures are estimates based upon a survey conducted by the United States League of Savings Institutions. The League is a national trade association, the membership of which consists of approximately 3,500 thrift institutions.

[2]The Federal Home Loan Bank Board has estimated that the net worth of the savings and loan industry was reduced by $5 billion during 1982. 15 Fed. Home Loan Bank Board J. 46 (May 1982).

federal savings and loans so as to insure that they would remain financially sound institutions able to supply financing for home construction and purchase. The due on sale regulation was promulgated with these purposes in mind. To the extent that State Law creates an obstacle to the accomplishment and execution of the full purposes and objectives of the due on sale regulation, that law is preempted.

The *de la Cuesta* decision further recognized that the Bank Board expressly determined that due on sale clauses are " 'a valuable and often an indispensable source of protection for the financial soundness of Federal associations and for their continued ability to fund new loan commitments.' " 12 CFR §556.9(f)(1) (1982). *Id.* at 3030:

> Specifically, the Board has concluded that the due on sale clause is 'an important part of the mortgage contract' and that its elimination 'will have an adverse effect on the earning power and financial stability of Federal associations, will impair the ability of Federal associations to sell their loans in the secondary markets, will reduce the amount of home-financing funds available to potential home buyers, and generally will cause a rise in home loan interest rates.' *Id.*

Restrictions like the Trial Court's ruling on land contract transactions will lengthen the expected maturity date of a lender's mortgages, thus reducing their marketability in the secondary mortgage market. As a result, if the Trial Court's decision is allowed to stand, the financial stability of Federal associations in Ohio will be eroded and the flow of home loan funds into Ohio will be reduced. *Id.*

In promulgating the due on sale regulation, which is almost word-for-word restated in the due on sale clause language in the Page's mortgage, the Bank Board sought to ensure the financial stability of local mutual thrift institu-

tions in which people invest their funds and which provide for the financing of homes. By doing so the Bank Board reasonably exercised its authority and intended to preempt *any and all* conflicting state restrictions on due on sale practices whether they be by state statute or by court decision.

Accordingly, since the Trial Court's holding failed to consider and follow the intent, purposes and objectives of the Bank Board regarding its due on sale regulation and the language restated therein; it erred in not holding that a land contract transaction, such as that entered into by and between the Pages and the Ethridges, does not trigger the due on sale clause contained in the mortgage executed by the Pages in favor of Citizens.

* * *